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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-1212

Filed: 15 August 2017

Forsyth County, No. 15 CRS 52586

STATE OF NORTH CAROLINA

v.

TERRY JEROME WILSON, Defendant.

Appeal by Defendant from order entered 4 May 2016 by Judge John O. Craig, III, in Forsyth County Superior Court. Heard in the Court of Appeals 1 May 2017.

*Attorney General Joshua H. Stein, by Assistant Attorney General T. Hill Davis, III, for the State.*

*The Law Office of Sterling Rozear, PLLC, by Sterling Rozear, for defendant-appellant.*

HUNTER, JR., Robert N., Judge.

Terry Jerome Wilson (“Defendant”) filed a motion to suppress evidence supporting his indictment for possession of a firearm by a felon. On 11 April 2016, the trial court orally denied Defendant’s motion to suppress, and entered a written order on 4 May 2016. On 13 April 2016, Defendant pled guilty to the charge of

possession of a firearm by a felon. On appeal, Defendant contends the trial court erred in denying his motion to suppress. We agree.

### **I. Factual and Procedural Background**

On 20 July 2015, a Forsyth County grand jury indicted Defendant for one count of possession of a firearm by a felon. On 14 September 2015, Defendant filed a motion to suppress evidence. On 11 April 2016, the trial court heard arguments on Defendant's Motion to Suppress.

The State called Officer B. K. Ayers of the Winston-Salem Police Department, Special Investigations Division. He testified as follows:

On 21 March 2015, at approximately 11:30 p.m., Officer Ayers assisted in executing a search warrant for narcotics at 2300 North Glenn Avenue in Winston-Salem ("the premises"). There had previously been "several discharging firearms in the immediate area." Officer Ayers also had previously responded to a shooting at the premises "where a subject inside had actually been shot in the face." That night, Officer Ayers, along with other officers, set up an outer perimeter around the Glenn Avenue residence until a SWAT team could secure the residence and ensure it was safe to conduct a search. Officer Ayers's duty prevented any passerby from entering the area to ensure the officers conducting the search would be safe. Officer Ayers feared firearms might be involved during narcotics-related searches.

Officer Ayers observed Defendant approaching the residence, as the SWAT team secured the area. The police wore “tactical gear” and “Kevlar helmets.” In Officer Ayers’s opinion, it was unusual for people to approach police in tactical gear in the dark. Defendant walked past Officer Christian, who was assisting Officer Ayers.<sup>1</sup> Officer Ayers noticed Defendant wore sweatpants. The Defendant’s pants pocket hung down from the weight of an object, causing the right side of Defendant’s pants to hang almost to his knee. Officer Ayers believed Defendant was armed. Officer Ayers thought if Defendant was armed, he was a threat.

Officer Ayers and Defendant approached each other. Officer Ayers asked Defendant why he was there. Defendant said he was retrieving his moped. Officer Ayers explained they were executing a search warrant, and asked Defendant if he had any weapons on him. Defendant told Officer Ayers he was not armed. Officer Ayers next told Defendant he was going to frisk him for weapons. Officer Ayers asked Defendant to turn away from him. Defendant turned around. Before the pat-down began, Officer Ayers could see the “butt end” of a pistol in Defendant’s pocket. Officer Ayers took the firearm from Defendant’s pocket. Defendant then told Officer Ayers he was a convicted felon. Officer Ayers handcuffed Defendant.<sup>2</sup> Officer W. A. Cumbo

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<sup>1</sup> Officer Christian was not present at this hearing.

<sup>2</sup> Officer Ayers does not testify as to what happened to Defendant after he handcuffed Defendant, except to state he walked Defendant up to the front of the building.

of the Winston-Salem Police Department arrested Defendant for possession of a firearm by a felon and misdemeanor carrying a concealed gun.<sup>3</sup>

The State offered no further testimony. Defendant offered no testimony. At argument, defense counsel first contended there was no evidence indicating Defendant engaged in criminal conduct. Defense counsel next contended, under *Terry v. Ohio*,<sup>4</sup> in order for Officer Ayers to lawfully detain Defendant, he had to have a reasonable suspicion criminal activity was afoot. Defense counsel further argued Officer Ayers unlawfully detained Defendant once he told Defendant to turn around. Because Officer Ayers unlawfully detained Defendant, the trial court should suppress the evidence of the handgun found in Defendant's pocket under the fruit of the poisonous tree doctrine.

The State responded even though *Terry*, on one hand, requires a reasonable suspicion that criminal activity is about to be committed, *Terry* also allows an officer to stop someone when there is a potential or apparent danger to an officer. The State contended Defendant's entering a premises while the police were executing a search warrant, combined with Officer Ayers's observation of a bulge in Defendant's pocket, is enough to trigger a stop and frisk under *Terry*. Because Officer Ayers was in a

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<sup>3</sup> The trial court dismissed this misdemeanor charge on 20 July 2015.

<sup>4</sup> 392 U.S. 1, 88 S.C. 1868, 20 L. Ed. 2d 889 (1968).

lawful position to observe the gun's handle in Defendant's pocket, the State contended Officer Ayers could lawfully seize the gun.

Following arguments from the State and Defendant, the trial court orally denied Defendant's motion to suppress. The trial court found it was "highly unusual for a citizen to approach a scene where the place is literally crawling with police . . . many of whom are in full SWAT-type gear." The trial court noted this act alone may not be enough to give rise to a "reasonable, articulable suspicion" but it would "heighten" Officer Ayers's attention. However, the trial court concluded once Officer Ayers saw a heavy object in Defendant's pants, Officer Ayers would then have a "reasonable, articulable suspicion to ask [Defendant] to stop and to turn around." The trial court also concluded Officer Ayers was entitled to remove the gun from Defendant's pants at that point because Officer Ayers could see the grip of the handgun.

Following these findings, Defendant preserved his right to appeal the denial of his suppression motion, and entered a guilty plea to possession of a firearm by a felon. The trial court accepted Defendant's plea and gave Defendant a suspended sentence of 14 to 26 months. The trial court also placed Defendant on 24 months of supervised probation. The trial court entered its judgment on 13 April 2016. The trial court entered its order denying Defendant's motion to suppress on 4 May 2016. Defendant did not orally appeal the judgment, but asks this Court through a petition for writ of

certiorari to review the 13 April 2016 judgment. We grant Defendant's petition in the interest of reviewing the trial court's order denying Defendant's motion to suppress and the judgment together.<sup>5</sup>

In its 4 May 2016 order denying Defendant's motion to suppress, the trial court made the following findings:<sup>6</sup>

- 1) On March 21, 2014, at about 11:00 p.m., officers of the Winston Salem Police Department executed a search warrant for the premises found at 2300 N. Glenn Ave[.] in Winston Salem.
- 3) Officer Ayers and other officers from his squad were assigned to secure the perimeter of the property while SWAT units made entry and secured the residence for execution of the search warrant. The officers were wearing uniforms clearly identifying them as police officers, plus additional safety equipment such as Kevlar and ballistic helmets.
- 4) The police presence at the 2300 N. Glenn Ave[.] was significant and the fact that the police intended to exclude the general public from the property during their operations would have been apparent to any passerby.
- 8) The Defendant proceeded past Officer Christian, walking up the driveway and toward the residence where SWAT team members were still conducting their operation.
- 9) Officer Ayers testified that it was very unusual for a member of the general public to come onto the premises where the type of police activity in this case is underway.

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<sup>5</sup> As to the judgment, Defendant merely argues at the conclusion of his brief his conviction hinges upon evidence obtained in violation of his constitutional rights.

<sup>6</sup> The trial court directed the State's attorney to prepare the order denying Defendant's motion to suppress.

*Opinion of the Court*

Upon observing Defendant's continued approach toward property where SWAT officers were still conducting their operations, Officer Ayers walked down the driveway toward the Defendant.

10) As [Officer Ayers] approached Defendant, Officer Ayers noted that the Defendant's sweatpants were hanging lower on one side than the other as the result of a heavy object in one of the pockets. Based upon his training and experience, and the apparent size, weight, and shape of the object, Officer Ayers believed that heavy object might be a gun or other type of weapon.

12) The [D]efendant complied with Officer Ayers'[s] command to turn around and face away from him. After the [D]efendant turned around and while now standing behind the Defendant, but before beginning the actual frisk or manipulating the Defendant's clothing, Officer Ayers observed what he recognized as the grip of a handgun in the weighted-down pocket of Defendant's sweatpants.

Based on those findings, the trial court concluded:

1) The Defendant's entry onto the premises at 2300 N. Glenn [Avenue] during SWAT operations and his continued travel beyond the perimeter established by uniformed police officers toward the building where SWAT operations were ongoing is behavior that a reasonable and prudent police officer would find unusual.

2) That behavior, coupled with the observations made of the size, weight, and shape of the object concealed in the Defendant's pocket caused Officer Ayers to reasonably believe that the Defendant might have been armed with a weapon and could pose a danger to himself or the other officers conducting operations inside the building the Defendant was approaching. Officer Ayers thus had a reasonable and articulable suspicion that the Defendant might have been armed and presently dangerous.

3) Officer Ayers's detention of Defendant under *Terry v. Ohio* was reasonable and justified.

4) Officer Ayers was lawfully in a position to observe the handgun grip that was in plain view once he could see into the weighted-down pocket of the Defendant's sweatpants.

5) Officer Ayers's seizure of the handgun was lawful.

## **II. Standard of Review**

Our review of a trial court's ruling on a motion to suppress is "limited to determining whether the trial judge's underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge's ultimate conclusions of law." *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982) (citations omitted). Where no exception is taken to a finding of fact by the trial court, the finding is presumed to be supported by competent evidence and is binding on appeal. *State v. Biber*, 365 N.C. 162, 168, 712 S.E.2d 874, 878 (2011). The trial court's conclusions of law are reviewable *de novo*. *Id.* at 168, 712 S.E.2d at 878. "Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment' for that of the lower tribunal." *Id.* at 168, 712 S.E.2d at 878 (quoting *State v. Williams*, 362 N.C. 628, 632-33, 669 S.E.2d 290, 294 (2008)).

## **III. Analysis**

The Fourth Amendment protects, *inter alia*, "[t]he right of the people to be secure . . . against unreasonable searches and seizures." U.S. Const. amend. IV.



“State officials’ actions must comport with the Fourth Amendment, as its requirements are ‘enforceable against the States through the Due Process Clause’ of the Fourteenth Amendment.” *State v. Johnson*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 783 S.E.2d 753, 760 (2016) (quoting *Wolf v. Colorado*, 338 U.S. 25, 27-28, 69 S. Ct. 1359, 1361, 93 L. Ed. 1782, 1785 (1949)).

“*Terry v. Ohio*, 392 U.S. 1, 27, 88 S. Ct. 1868, 1883, 20 L. Ed. 2d 889 (1968), recognized a ‘narrowly drawn’ exception to the probable-cause requirement of the Fourth Amendment for certain seizures of the person that do not rise to the level of full arrests.” *United States v. Sharpe*, 470 U.S. 675, 689, 105 S. Ct. 1568, 1577, 84 L. Ed. 2d 605, 617 (1985). “[W]hen the intrusion on the individual is minimal, and when law enforcement interests outweigh the privacy interests infringed in a *Terry* encounter, a stop based on objectively reasonable and articulable suspicions, rather than upon probable cause, is consistent with the Fourth Amendment.” *Sharpe*, 470 U.S. at 689, 105 S. Ct. at 1577, 84 L. Ed. 2d at 618.

Officer Ayers helped set up a perimeter in order to prevent the public from entering an area subject to a search warrant. Officer Ayers noticed Defendant enter that area. Defendant and Officer Ayers approached each other, and Officer Ayers observed the weighted bulge in Defendant’s pocket. This prompted Officer Ayers to question Defendant, which culminated in the *Terry* stop Defendant now challenges.

On appeal, Defendant contends the trial court erred in denying Defendant’s

motion to suppress evidence of the handgun because Officer Ayers's seizure of Defendant was not based on a reasonable suspicion of criminal activity. Defendant also contends Officer Ayers's frisk of Defendant was not based on a reasonable suspicion he was armed and dangerous. We agree.

This Court recently held:

Pursuant to *Terry* . . . [a] frisk . . . may only be justified by two independent criteria. First, in order to conduct an investigatory detention—a “*Terry* stop”—in the first place, the police must have reasonable suspicion “that criminal activity may be afoot.” Second, the police must also have reasonable suspicion “that the persons with whom [they are] dealing may be armed and presently dangerous” in order to justify “a carefully limited search [—a “*Terry* frisk”—] of the outer clothing of such persons in an attempt to discover weapons which might be used to assault [them].”

*Johnson* at \_\_\_, 783 S.E.2d at 760 (quoting *Terry* at 30-31, 88 S. Ct. at 1885, 20 L. Ed. 2d at 911) (internal citations omitted). An officer does not need probable cause to stop an individual. *State v. Harris*, 95 N.C. App. 691, 696, 384 S.E.2d 50, 53 (1998). “[R]easonable suspicion may be demonstrated through an evidentiary showing that is ‘considerably less than [a] preponderance of the evidence.’” *State v. Mangum*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 795 S.E.2d 106, 117, (2016) (quoting *Illinois v. Wardlow*, 528 U.S. 119, 124, 120 S. Ct. 673, 676, 145 L. Ed. 2d 570, 576 (2000)).

This “reasonable suspicion” standard requires “[t]he stop. . . be based on specific and articulable facts, as well as the rational inferences from those facts, as viewed through the eyes of a reasonable, cautious officer, guided by his experience

and training.” *State v. Barnard*, 362 N.C. 244, 247, 658 S.E.2d 643, 645 (2008) (alterations in original) (internal quotations omitted). “[C]ontext matters: actions that may appear innocuous at a certain time or in a certain place may very well serve as a harbinger of criminal activity under different circumstances.” *Johnson* at \_\_\_, 783 S.E.2d at 762 (quoting *United States v. Branch*, 537 F.3d 328, 336-37 (4<sup>th</sup> Cir. 2008)). Courts should “credit [an officer’s] practical experience,” (quoting *United States v. Lender*, 985 F.2d 151, 154 (4<sup>th</sup> Cir. 1993)), and not “indulge in unrealistic second-guessing” of a law enforcement official’s judgment call. *Johnson* at \_\_\_, 783 S.E.2d at 762 (quoting *Sharpe*, 470 U.S. at 686, 105 S. Ct. at 1575, 84 L. Ed. 2d at 616). Finally, “courts must consider ‘the totality of the circumstances—the whole picture.’” *Johnson* at \_\_\_, 783 S.E.2d at 762 (quoting *United States v. Cortez*, 449 U.S. 411, 417, 101 S. Ct. 690, 695, 66 L. Ed. 2d 621, 629 (1981)); *State v. Butler*, 331 N.C. 227, 233, 415 S.E.2d 719, 722 (1992). Whether a *Terry* stop is legal hinges upon “the cumulative information available” to the acting officer. *Johnson* at \_\_\_, 783 S.E.2d at 762 (quoting *United States v. Arvizu*, 534 U.S. 266, 273, 122 S. Ct. 744, 750, 151 L. Ed. 2d 740, 750 (2002)).

In determining whether Officer Ayers had a reasonable suspicion criminal activity was afoot, a court looks at the situation “through the eyes of a reasonable, cautious officer” who is “guided by his experience and training.” *Barnard* at 247, 658 S.E.2d at 645. A court considers “factors such as activity at an ‘unusual hour,’ and

‘an area’s disposition toward criminal activity’ as articulable circumstances.” *State v. Parker*, 137 N.C. App. 590, 601, 530 S.E.2d 297, 304 (2000) (citations omitted). A “bulge” in an individual’s pocket may also be a contributing factor. *See State v. Streeter*, 283 N.C. 203, 208, 195 S.E.2d 502, 507 (1973) (An officer’s observation of “something bulging from under [defendant’s] shirt” contributed to that officer’s probable cause for an arrest).

A *Terry* stop or detention occurs when “police conduct [communicates] to a reasonable person that he [is] not at liberty to ignore the police presence and go about his business.” *State v. Williams*, 201 N.C. App. 566, 569, 686 S.E.2d 905, 907 (2009) (citations omitted). Officer Ayers’s detention of Defendant occurred when Officer Ayers told Defendant he “was going to frisk him for weapons.” Therefore, in determining whether Officer Ayers had a reasonable suspicion Defendant was about to engage in criminal activity, we examine only the evidence leading up to this initial detention.

Based on our *de novo* review, we conclude the trial court erred in denying Defendant’s motion to suppress because it failed to make the required conclusion of law that Officer Ayers observed conduct sufficient to raise a reasonable articulable suspicion Defendant was engaged in criminal activity. *Johnson* at \_\_\_, 783 S.E.2d at 760; *see also State v. O’Connor*, 222 N.C. App. 235, 241, 730 S.E.2d 248, 252 (2012) (“[f]indings and conclusions are required in order that there may be a meaningful

appellate review of the decision on a motion to suppress.”) (quotation marks and citations omitted). The trial court found Defendant’s entering a premises subject to a search warrant was behavior “a reasonable and prudent officer would find unusual.” The trial court also ruled Defendant’s actions, coupled with the bulge in his pocket, caused Officer Ayers “to reasonably believe that the Defendant might have been armed with a weapon and could pose a danger to himself or the other officers.” Therefore, the trial court concluded “Officer Ayers had a reasonable and articulable suspicion that the Defendant might have been armed and presently dangerous.” These conclusions fall short of the *Terry* standard.

Objective facts sufficiently supporting a reasonable suspicion of criminal activity must be the predicate for a law enforcement officer’s seizure of an individual. This Court, even under a *de novo* review, cannot uphold a trial court’s denial of a motion to suppress absent such facts. This Court’s *de novo* review is limited to the trial court’s findings of fact, and its conclusions based upon those findings. *Cooke* at 134, 291 S.E.2d at 619.

This case presents unique circumstances since the trial judge failed to make the necessary findings of fact to support the determination Officer Ayers lawfully stopped Defendant. The trial court’s conclusions simply state a reasonable officer would find Defendant’s behavior “unusual.” However, “unusual” behavior does not necessarily equal behavior leading a reasonable officer to believe criminal activity

was afoot. Officer Ayers may have acted reasonably in preventing Defendant from continuing onto a premises currently being searched pursuant to a search warrant. However, this does not mean Officer Ayers was justified under *Terry* in doing any more than informing Defendant he could not proceed to the residence.

Because the trial court failed to conclude Officer Ayers had a reasonable, articulable suspicion Defendant was engaged in criminal conduct, and because the trial court's findings failed to support that conclusion, we reverse the trial court's order denying Defendant's motion to suppress. Furthermore, because Officer Ayers unlawfully stopped and detained Defendant, the discovery of Defendant's weapon was the fruit of that unlawful stop. Therefore we also reverse and vacate the judgment against Defendant for possession of firearm by a felon.

REVERSED AND VACATED.

Chief Judge McGEE and Judge ZACHARY concur.

Report per Rule 30(e).